

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Criminal No. 10-20403

Honorable: Nancy G. Edmunds

v.

D-2 BOBBY W. FERGUSON,

Defendant.

**Combined Application, and Brief in Support of Application, to Enter Second
Amendment to Amended Preliminary Order of Forfeiture to Forfeit
Substitute Property of Defendant Bobby Ferguson**

Pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 1963(m), Plaintiff seeks a second amendment to the Amended Preliminary Order of Forfeiture (ECF 490) ordering the forfeiture of a Harley Davidson Motorcycle, VIN: 1HD1FRW161Y654039 (Harley Davidson), titled to Defendant Bobby W. Ferguson (Ferguson), as substitute property, to be liquidated and the net proceeds to be applied toward the balance owed on Ferguson's forfeiture money judgment. Concurrence in this application was not sought because Ferguson is an incarcerated prisoner proceeding pro se. The government will submit a proposed Second Amendment to Amended Preliminary Order of Forfeiture to the Court via ECF utilities. In support, the United States provides the following and the Affidavit of John Scarbrough attached as Exhibit A.

Introduction

On October 21, 2013, this Court entered an Amended Preliminary Order of Forfeiture (Amended POF) ordering, among other things, the forfeiture of specific property to the United States pursuant to 18 U.S.C. § 1963(a)(1)-(3), 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), and imposing a forfeiture money judgment against Ferguson in the total amount of \$6,284,000, which represents the total amount obtained as a result of Ferguson's violation of 18 U.S.C. § 1962(d) (RICO conspiracy) as alleged in Count One of the Fourth Superseding Indictment. (ECF 490). The Amended POF provides that "the money judgment may be satisfied, to whatever extent possible, from any property owned or under the control of Defendant Ferguson." (*Id.* at p. 7).

All ancillary proceedings have been resolved with regard to the forfeiture of the specific property listed in the Amended POF and Ferguson's conviction was affirmed on appeal. *United States v. Kilpatrick et. al.*, 798 F.3d 365 (6th Cir. 2015), *cert. denied sub nom. Ferguson v. United States*, 136 S. Ct. 700 (2015).¹

1. Ferguson's forfeiture money judgment has been partially satisfied by the forfeiture of specific assets listed in the Amended POF; however, there is a

¹ In or about December 2013, third parties filed claims to certain property listed in the Amended POF. (Ancillary Case Nos. 13-mc-51747 and 13-mc-51710). These claims were resolved and the Court entered an Amendment to Amended POF on February 5, 2015. (ECF 565).

balance owing on the money judgment in excess of five million dollars. The government is aware that the Harley Davidson is titled to Defendant Bobby W. Ferguson and it has an appraised value of approximately \$3,730 as of July 18, 2019. (Exh. A, Declaration of John Scarbrough).

The amount obtained from forfeiting and liquidating the Harley Davidson will not exceed the amount Ferguson owes on the money judgment.

As set forth below, because of the acts and/or omissions of Ferguson, the full amount of proceeds obtained by Ferguson as a result of his violation of Count One are not available for forfeiture for one or more of the reasons set forth in 18 U.S.C. § 1963(m), and therefore, forfeiture of the Harley Davidson as substitute property should be ordered.

Legal Support for Forfeiture of Substitute Property

Once a forfeiture order for a money judgment is entered in connection with a RICO conviction, the United States is authorized, pursuant to 18 U.S.C. § 1963(m) and Fed. R. Crim. P. 32.2(e)(1)(B) to seek to amend the order to forfeit any property belonging to the defendant having a value up to the amount of the money judgment, as substitute assets, if one of the conditions listed under 18 U.S.C. § 1963(m) is present.²

² The forfeiture of “substitute assets” is authorized under 18 U.S.C. § 1963(m), which is virtually identical to 21 U.S.C. § 853(p). *United States v. Ripinsky*, 20

Section 1963(m) provides that the court shall order the forfeiture of any other property of the defendant when, as a result of any act or omission of the defendant, the actual property subject to forfeiture: (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty.

The government must show that just one of the conditions is satisfied. *United States v. Wetselaar*, 2018 WL 3419254, at *2 (D. Nev. July 13, 2018). The government generally has little difficulty in making the necessary showing. *See e.g., United States v. Gordon*, 710 F.3d 1124, 1166 (10th Cir. 2013) (a financial analyst's affidavit stating that he reviewed defendant's records and could not find the proceeds is sufficient); *United States v. Alamoudi*, 452 F.3d 310, 315 (4th Cir. 2006) (it is sufficient if a law enforcement agent submits that she has searched for the missing assets and that despite the exercise of due diligence she has been unable to find them); *United States v. Loren-Maltese*, 2003 WL 291910, *1 (N.D. Ill. Feb. 10, 2003) (defendant's failure to disclose the whereabouts of funds derived

F.3d 359, 362 (9th Cir. 1994). Therefore, cases decided under Section 853(p) and 1963(m) may be referred to interchangeably. *Id.*

from her racketeering conspiracy was an “omission” warranting the forfeiture of substitute assets).

The forfeiture of substitute assets is solely a matter for the court, not the jury. Fed. R. Crim. P. 32.2(e)(3). *See United States v. Saccoccia*, 564 F.3d 502, 507 (1st Cir. 2009) (there is no constitutional right to have the jury determine any issue relating to criminal forfeiture, so there can be no such right with respect to substitute assets). The court may amend an existing forfeiture order *at any time* to order the forfeiture of substitute assets. Fed. R. Crim. P. 32.2(e)(1)(B).

Once the Court enters the order forfeiting substitute assets, third parties have a right to contest the forfeiture by asserting a superior ownership interest in the ancillary proceeding pursuant to 18 U.S.C. § 1963(l) and Fed. R. Crim. P. 32.2(e)(2).

Argument

Here, Ferguson was ordered to forfeit to the United States a total of \$6,284,000. (ECF 490). The government exercised due diligence in searching for proceeds of Ferguson’s offenses. As a result of its extensive financial investigation, the government located and forfeited some of the proceeds of Ferguson’s offenses (*see* ECF 490). However, the government has been unable to locate the entire amount of funds that Ferguson obtained from his RICO offense due to acts and omissions of Ferguson. (Exh. A, Declaration of John Scarbrough).

Evidence at the trial in this case demonstrated that Ferguson shared a significant amount of proceeds obtained as a result of the RICO Conspiracy (Count One) with co-defendant Kwame Kilpatrick, and Kilpatrick spent large sums on lavish vacations, expensive clothing, parties, and summer camps for his children, among other things. (*Id.*). Therefore, as a result of Ferguson's acts, proceeds of the RICO conspiracy were dissipated and are no longer available for forfeiture. (*Id.*)

The government's investigation regarding the Harley Davidson revealed that some of the funds used to obtain and maintain the Harley Davidson are traceable to accounts into which Ferguson commingled tainted and untainted funds. (*Id.*) Given Ferguson's use of commingled funds to purchase the Harley Davidson, the government is unable to establish that the Harley Davidson constitutes property subject to direct forfeiture as 100% "proceeds" of an offense for which Ferguson was convicted. Due to Ferguson's acts, the actual property subject to forfeiture has been commingled with other property to purchase the Harley Davidson, which cannot be divided.

Finally, Ferguson has not disclosed the location of forfeitable proceeds sufficient to satisfy the forfeiture money judgment. As a result of Ferguson's omission, the actual property subject to forfeiture cannot be located upon the

exercise of due diligence, warranting the forfeiture of substitute assets. *United States v. Loren-Maltese*, 2003 WL 291910, at *1.

As discussed above, one or more of the substitute property elements set forth in 18 U.S.C. § 1963(m) have been satisfied. Because directly forfeitable property cannot be located, the government seeks to partially satisfy the money judgment by forfeiting the Harley Davidson as a substitute asset under 18 U.S.C. § 1963(m).

After Ferguson's interest in the Harley Davidson is ordered forfeited, the United States will initiate proceedings necessary to protect any third party interests in that property, pursuant to 18 U.S.C. § 1963(l) and Fed. R. Crim. P. 32.2(b)(6) and (e)(2).

Conclusion

Based upon the foregoing, Exhibit A attached hereto, and the record in this case, the United States requests that its application to forfeit the Harley Davidson as substitute property be granted, the United States be authorized to take any other steps deemed warranted to preserve the motorcycle's availability for forfeiture pending the completion of the ancillary proceedings, and that the Court enter the

proposed Second Amendment to Amended Preliminary Order of Forfeiture being submitted by the government to the Court via ECF utilities.

Respectfully submitted,

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Dated: August 22, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2019, the foregoing was electronically filed using the ECF system which will send notification of such filing to all ECF participants, and the foregoing was also sent via certified mail to Bobby Ferguson at the following address:

Bobby W. Ferguson
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F.C.I. Elkton
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